OCBC BANK (M) BHD

v.

CTK ENTERPRISE SDN BHD

HIGH COURT MALAYA, IPOH
PS GILL J
[ORIGINATING SUMMONS NO: 24-600-99]
19 OCTOBER 1999

CIVIL PROCEDURE: *Adjournment - Application for - Whether valid reasons given*

CIVIL PROCEDURE: *Affidavits - Contents - Non-compliance of initial affidavit with O. 83 r. 3(3) Rules of the High Court 1980 - Requirement complied with in subsequent affidavit - Whether permissible*

LEGAL PROFESSION: *Practice of law - Unauthorised person - Pupil in chambers requested adjournment on behalf of counsel of another firm - Legal Profession Act 1976, s. 36(2) - Whether allowed*

LAND LAW: *Sale of land - Auction - Default in repayment of monies due - Whether bare denial of debt in affidavit in reply sufficient*

This case was an application by the plaintiff for an order for sale of the defendant's land by public auction.

The said land was charged by the defendant to the plaintiff as security for the repayment to the plaintiff of all monies and liabilities owing to it. The defendant defaulted, failed to comply with a written notice of default and was served with the statutory notice in Form 16 of the National Land Code 1965 by the plaintiff.

At the hearing of the originating summons, a pupil in chambers appeared on behalf of the defendant requesting an adjournment. The reason being the defendants counsel was engaged at the material time in the magistrate's court in Kuala Lumpur.

The plaintiff's counsel objected to the adjournment and questioned the *locus standi* of the pupil to appear on behalf of the defendant's counsel as he was a pupil of a firm other than that of the defendant's counsel.

Also in issue was the fact that the plaintiff's initial affidavit did not comply with O. 83 r. 3(3) of the Rules of the High Court 1980 ('RHC'), whereas the subsequent one did by giving a breakdown of the amount owing by the defendant.

Held:

[1] From a plain reading of s. 36(2) of the Legal Profession Act 1976 a pupil in chambers is strictly forbidden to appear on behalf of anyone but his master, or a firm in which his master is practising.

[2] If an application for postponement is made at the outset of the hearing, then counsel should proffer valid grounds for the postponement and also explain to the court why the court had not been informed of the application for adjournment before the date of hearing. Granting of adjournments on the slightest pretext bedevils the administration of justice, and thus should be exercised sparingly.

[3] That counsel would choose to give priority to a Magistrate's Court hearing as opposed to a High Court hearing is baffling. Even if the Magistrate's Court hearing was one of particular importance, it behoves on the counsel to make necessary arrangements for someone else from his firm to not only appear but be ready to proceed on the matter. The adjournment was disallowed as there was a failure to satisfy the judge the need for adjournment.

[4] Although the initial affidavit failed to comply with O. 83 r. 3(3) RHC, the subsequent affidavit did and that was permissible. More than one affidavit could usually be filed in this type of case because invariably the matter could not be disposed of on the first return date. Provided evidence of the correct amount due had been put before the hearing date, the court had the power to dispense some omission to fulfill the rules to the letter, but only if no real prejudice would thereby result to the defendant.

[5] The affidavit in reply by the defendant tantamounted to a general denial of the amount owing. A bare denial of a debt is never enough. The chargor also has an onus if he denies the amount claimed to say how much he admits owing. The affidavit of the defendant did not have such particulars.

[Order for sale granted.]

Case(s) referred to:
Abdul Mutalib Dato' Seri Razak v. Malaysian Bar & Anor [1998] 2 CLJ 751 ***(refd)***

Legislation referred to:
Legal Profession Act 1967, s. 36(2)
National Land Code 1965, Form 16D
Rules of the High Court 1980, O. 83 r. 3(3)

For the plaintiff - Cheah; M/s Lim Seong Chun & Co
For the defendant - Pritam Singh

Reported by Sherin Kunhibava

JUDGMENT

PS Gill J:

This is an application by OCBC Bank (Malaysia) Bhd for an order for sale of the defendant's land (the land) to be sold by public auction.

The said land was charged to OCBC Bank on 4 July 1997, as security for the repayment to OCBC Bank of all monies due and liabilities owing to OCBC Bank (Malaysia) by the defendant who was referred to in the charge as "the chargor".

Clause 3 of the annexure to the said charge reads in material particular as follows:

The chargor will on demand repay and pay to the lender the indebtedness provided that no such demand for payment shall be made by the lender unless:

(i) In accordance with the provisions of any of the security documents, the facility and all ...

(ii) The chargor commits a breach of any of the covenants ...

(iii) Any of the events specified in cl. 7.1 shall occur; or

(iv) Any other securities executed by the chargor or any security party or any other person or party pursuant to any of the security documents shall become enforceable.

On 2 April 1999, solicitors for the plaintiff gave the defendant written notice of default, and required repayment of RM212,234.01, outstanding, as of 28 February 1999.

The letter was not complied with. On 13 May 1999, solicitors served the defendant with the statutory notice in Form 16D of the National Land Code 1965 ('the NLC'). It was served on the defendant, by way of AR Registered post, and was apparently acknowledged by the defendant.

On the appointed date of hearing of the Originating Summons, Mr. Pritam Singh who appeared on behalf of the defendant requested an adjournment, in view of the fact that Mr Bachan Singh, counsel for the defendant, who had conduct of this matter was presently engaged in the magistrate's court Kuala Lumpur. Miss Cheah for the plaintiff vehemently objected to any request for an adjournment, and insisted that the matter proceed as scheduled. Miss Cheah then made a part observation on the *locus* of Mr Pritam Singh, to appear on

behalf on the Firm of Bachan & Kartar; as he was a pupil in chambers in the Firm of Sri Ling & Co. There was no evidence to suggest, that he had filed his papers for a change of chambers for pupillage at that point of time. In all fairness Miss Cheah did not ardently pursue this issue. Mr Pritam Singh made no attempt to clarify his position on this issue. On my part, one needs only to look at s. 36(2) Legal Profession Act 1967 which reads as follows:

> A judge may, upon application made in Chambers by a Master at the commencement of the pupillage of the Master's pupil, make an order **that the pupil be permitted to appear on behalf of the Master or of the firm in which the Master is practising** – (emphasis is mine)
>
> (a) during the period of three months from the date of the order –
>
> (i) before a judge or a Registrar of the High Court, in Chambers;
>
> (ii) before a President of the Sessions Court or a Magistrate, in Chambers;
>
> (iii) before a Registrar of the Subordinate Courts,
>
> to mention a case, including entering judgment in default, or to apply for bail or to take a consent judgment or order; and
>
> (b) at the expiration of the said period of three months in chambers in the High Court and in the Subordinate Courts and before any Magistrate, to conduct any cause or matter.

It would seem from a plain reading of the said section that a pupil in chambers is strictly forbidden to appear on behalf of anyone but his master, or a firm, in which his master is practising. I would exhort all lawyers who intend to take on pupils in chambers to abide strictly by this provision.

On the issue of adjournment, I must say with deep regret that there is a growing tendency of counsels appearing in court, but not ready to proceed with the hearing of the case. It would seem that Mr Pritam Singh in this case appeared in court with the idea that he would get a postponement as a matter of right. It is most presumptuous to preempt the decision of the court. When a case is fixed for hearing the counsel who appears in court must ensure that he is ready to proceed for hearing, even though the counsel intends to apply for a postponement, because granting of a postponement is at the discretion of the court. Granting of adjournments on the slightest pretext bedevils the administration of justice, and thus should be exercised only sparingly.

In exercising this discretion the court will consider the merits of the application. The court will only grant a postponement if reasons given are satisfactory. In this instance I was informed that Mr. Bachan Singh counsel having conduct of this matter was engaged in a magistrate's court case in Kuala Lumpur. It is beyond me that a counsel would choose to give priority to a magistrate's court hearing as opposed to a High Court hearing. Even if the magistrate's court hearing was one of particular importance, it behoves

on the counsel to make necessary arrangements for someone else from his firm to not only appear but be ready to proceed on the matter.

It would be prudent for counsels who wish to seek adjournments to write in to court at least three days before the hearing to apply for a postponement. By doing so counsel may be able to know whether the application for postponement has been granted or not. If the court does not respond, counsel must then assume that the application for postponement is not granted and to be ready for the hearing. *Abdul Mutalib Dato Seri Razak v. Malaysian Bar & Anor* [1998] 2 CLJ 751.

If an application for postponement is made at the outset of the hearing, then counsel should proffer valid grounds for the postponement and also explain to the court why the court had not been informed of the application for adjournment before the date of hearing. Mr Pritam Singh had failed on all accounts to satisfy me as to why I should grant the adjournment. I thus disallowed his request for adjournment and proceeded to hear the matter.

This originating summons was filed on 29 June 1999. The affidavit in support was deposed by the manager of OCBC Bank on 1 July 1999.

A close reference to O. 83 of the Rules of High Court (RHC) 1980 will be pertinent in order to appreciate certain issues that I wish to elaborate on. In the initial affidavit filed by the plaintiff's bank, I noticed that there was non-compliance, with the provisions of O. 83 r. 3(3) RHC 1980. However in a subsequent affidavit filed, on 14 October 1999, the plaintiff had given a breakdown of the amount owing on both the overdraft, and the term loan account, granted by the plaintiff to the defendant. This is quite permissible, as more than one affidavit can usually be filed in this type of case because invariably the matter cannot be disposed of on the first return date. Provided evidence of the correct amount due has been put before the hearing date, the court has the power to dispense some omission to fulfill the rules to the letter, but only if no real prejudice will thereby result to the defendant.

An affidavit in reply was filed by the defendant, on 2 August 1999, which in the main strikes me as being a general denial of the amount owing. It is trite law that a bare denial of a debt is never enough. The chargor (defendant) also has an onus if he denies the amount claimed to say how much he admits owing. Sadly the affidavit of the chargor/defendant does not condescend to such particulars. Thus there was to my mind "no cause to the contrary" and I allowed the plaintiff's claim and granted an order for sale.